Supreme Court, U.S.
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No. 92-1320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MISSOURI DIVISION OF EMPLOYMENT SECURITY
and C. BRUCE CORNETT,
Petitioners,

VS.

WILMA HASE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Respondent objects to the presentation of the questions presented by the Petitioners. The question presented should be as follows:

1. Whether the Court of Appeals erred in determining that Respondent provided evidence to challenge Petitioners' articulated reason for their promotional decision and in determining that there is a genuine dispute of material fact concerning the ultimate issue of discrimination.

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STATEMENT OF THE CASE

Respondent Wilma Hase was first employed by Petitioner, Division of Employment Security (DES) on January 6, 1958. Petitioner C. Bruce Cornett was the Director of the Division and the "Appointing Authority" under Missouri law pursuant to Section 36.030 Revised Statutes of Missouri (R.S.Mo). The DES operates a number of local employment offices throughout the state and the agency is largely administered from a central office in the state capitol. Positions in the agency are filled pursuant to the state merit system law. Certain non-entry level positions are filled from a "promotional register" which is restricted to current

employees. Section 36.320 R.S.Mo. Respondent was on a list of eligibles for promotion to "Manager I" position. The eligible list or "register" was compiled by the Missouri Department of Personnel. (R.301) Examinations are conducted and graded. The numerical score on the exam is combined with a numerical score derived from consideration of education and experience. Veterans are given 5 points and disabled veterans are given 10 points. Section 36.220 R.S.Mo. Ranking on the registers is based on the combined scores. Respondent's score on the Manager I register was enhanced because of her "Highly Successful" performance appraisal and she was moved to the second ranking on the register. (R.302-304) When openings occur letters are sent to each person on the register to determine availability for the position in question. A position became open in the Mexico, Missouri office in 1987 for "E.S. Manager I." This was the top job in that office. Respondent was on the Manager I register and Respondent received such a letter inquiring as to her availability. She signed it on February 7, 1987, stating that she was available. (R.199-200). The Appointing Authority is to make the promotions based on merit and fitness from the top ten persons on the register. Section 36.150 R.S.Mo. and Section 36.030.3 R.S.Mo.

Respondent was 57 years of age when the promotional decision by Petitioners was made. She was the only woman in the top ten persons ranked on the register and ranked second. (R.17 and 232; 302-304) The candidate selected, Mr. Roger Otey, was 37 years of age, was a male and ranked sixth. He was the youngest on the register. He had been with the agency since 1973. (R.162) Mr. Otey was an African-American but race did not enter into the decision to promote him to this position and the promotion was not part of a quota or affirmative action program. (R.87) Respondent denies that the appointing authority (D. Bruce Cornett) "was free to select anyone among the top ten on the list of eligibles" as stated in Petitioners' Statement of The Case (p. 3). Respondent contends that the Petitioners were bound to consider

the rankings in the appointment and to appoint on the basis of merit and fitness pursuant to the merit system law.

There was nothing in the listed qualifications for the Manager I position which required prior supervisory positions with the agency. The qualifications listed were: Five years of technical or professional public contact work, including one year with the Division of Employment Security at the level of Employment Service or Claims Supervisor I, or two years at the level of Employment Security Technician or a Claims Technician. College education with specialization in the social sciences, public, personnel, or business administration, or in closely related areas may be substituted on a year-for-year basis for the required non-specialized experience, up to a maximum of four years. (R.31) During Hase's employment with the agency she had made two previous applications for supervisory positions and each time did not receive an interview or a call pertaining to the applications submitted. (R.31) Respondent had attended seminars and training sessions for management and supervision: "Basic Supervision," Breech Academy, Kansas City, Missouri; "Basic Supervision For Public Service," Office of Administration, State of Missouri; "Management and Supervision," Office of Administration, State of Missouri; and "Human Relations," University of Colorado, Boulder, Colorado. (R.300) She further testified (by affidavit) that from 1975 through 1986, she had "in excess of 1,300 hours, the equivalent of over 33 weeks, in management, supervision and training responsibilities as set out on her time distribution sheet which is prepared weekly for the Missouri Division of Employment Security under the 600 code, which code is for management, supervision and training, and allocates how her weekly time is spent." (R.300)

Petitioners admit in their Answer that Respondent "met the minimal qualifications for the position." (R.12) The District Court found that: "The defendants concede, and the facts support, that there is sufficient evidence to support a *prima facie*

case of age or sex discrimination in defendant's failure to promote plaintiff." (A.17)

Cornett, the appointing authority, never reviewed any candidate's (eligibles on the "register") individual personnel files, performance appraisals, exam scores and conducted no interviews prior to appointing Mr. Otey. (R.70-71; 84-85) The criteria testified to by Cornett for making appointments was: "Who's going to get the job done. Who is going — if its a position that's been very well managed or handled in the past, we got to get somebody that at least maintains that or improves it and that's the criteria. That really ends up to getting down to the gut feeling as to who can handle that particular job." (R.72-73)

Petitioners' Statement of The Case recites that "Hase conceded that it would be reasonable for a person making an appointment to consider prior experience in supervisory positions when making an appointment to a supervisory position." The Petitioners cite the Record at (R.67-68, 111). This is incorrectly quoted and incorrectly cited to the Record. The Record at 241 reveals the following questions propounded by Mr. Farmer and answers of Wilma Hase:

Q. "In managing an office or in being considered for any management position, would you agree that prior supervisory and management position is an important factor to consider?

A. It's not a requirement on the job description for ES Manager I for the Personnel Division.

Q. Would you agree that it could be an important factor to consider —

A. Yes.

Q. — prior supervisory management positions.

A. Yes.

Q. And you have held no prior management or supervisory positions under the merit system, have you?

A. Not in the —

Q. And Mr. Otey had held management and supervisory positions under the merit system; is that right?

A. I don't know."

(R.241-242)

Respondent also produced evidence that she had qualifications which the first ranked person on the register did not have: "He would not have been knowledgeable of the economic conditions, the employment problems and practices, the labor pool in the areas whereas I would have been." (R.243) Hase was a resident of Mexico, Missouri, the location of the Manager I job in question, and had 12 years experience working in the Mexico, Missouri office. (R.299)

With regard to her own qualifications as opposed to Mr. Otey's Respondent testified: "I had a higher score, test score, I had more actual on-the-job experience, supervisory experience even though I did not have the job title than Mr. Otey. I'm well qualified and knowledgeable of the community that the job opening existed in." She further stated: "I have knowledge of the Unemployment Insurance Section, the Employment Service Section, the Employer Contact Section. My qualifications are very much better than his." (R.211) Later she testified: "I have wide knowledge of all the programs in the Employment Security Section. I have the unemployment insurance background which Mr. Otey did not have any knowledge of. I was the counterpart of the Employment Service Claims Supervisor in Columbia for 12 years in Mexico which Mr. Otey doesn't have." (R.213)

Respondent testified in her deposition that defendant Cornett had made statements to another employee that he "wanted to get rid of all of the old people." (R.229-230)

SUMMARY OF THE ARGUMENT

The Court should deny this Petition. Petitioners' contention (in Reasons For Granting The Writ) that the decision of the Eighth Circuit "ignores the Court's holding concerning the appropriate function of summary judgments and removes any possibility that an employment discrimination defendant in a disparate treatment case can secure a summary judgment" is not supportable. The second contention that the "circuit court's opinion overlooks and attempts to eliminate the fourth element of a *prima facie* employment discrimination case created by this Court" is likewise unfounded. In Petitioners' Point I they contend that a plaintiff's minimum qualifications must address the legitimate reason for the employment decision. This assertion is not supported by any decision cited by Petitioners. Finally, in Point II, Petitioners contend that the decision below holds that the fourth element of the *prima facie* case can be established by showing only the minimal qualifications for the job sought.

Petitioners have waived the right to now raise the argument that the fourth element of the *prima facie* case was not satisfied by Respondent in the case below. The District Court made a finding that the Petitioners had conceded, and the plaintiff had proven, a *prima facie* case that the promotional decision was based on age or sex. The Petitioners failed to file a cross appeal on this issue in the Court of Appeals.

The decision of the Eighth Circuit Court of Appeals is not in conflict with the decisions of another court of appeals on the same matter; it is not in conflict with a decision of this Court; it is not in conflict with a state court of last resort in Missouri; it has not departed from the accepted and usual course of judicial proceedings or sanctioned a departure by the District Court so as to call for the exercise of this Court's power of supervision. Finally, the Court of Appeals has not decided an important question of federal law which should be decided by this Court or

decided a federal question in a way that conflicts with the applicable decisions of this Court. On the contrary, the decision of the Court of Appeals is well reasoned and is in harmony with the decisions of this Court as enunciated in *McDonnell Douglas v. Green,* 411 U.S. 792 (1973); *United States Postal Serv. v. Aikens,* 460 U.S. 711 (1983) and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

It is clear from the record as a whole that there are genuine disputes of material fact in this case. Petitioners cite numerous cases which when examined provide no conflicting statements of the law with the case at bar.

The fact that the employer has articulated only one reason for the selection of Mr. Otey over the Respondent (the reason being that he had previous supervisory experience) looks lame when it is shown that supervisory experience was not listed on the job description. When Respondent's qualifications (which are based on objective proof such as exam scores, performance appraisals, work history, variety of experience, training, knowledge of office functions, knowledge of the community served by the office, overall years of service, and, above all, her ranking on the register) are matched against Mr. Otey's, he does not measure up. Respondent's superior qualifications renders the Petitioners' whole argument about "relatively similar" qualifications specious and moot.

The facts of record do not support a case for hypothetical review as suggested in Petitioners' Petition at page 21 and no case of hypothetical review merits the attention of this Court.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN DETERMINING THAT RESPONDENT PROVIDED EVIDENCE TO CHALLENGE PETITIONERS' ARTICULATED REASON FOR THEIR PROMOTIONAL DECISION AND IN DETERMINING THAT THERE IS A GENUINE DISPUTE OF MATERIAL FACT CONCERNING THE ULTIMATE ISSUE OF DISCRIMINATION.

A. The Decision of The Eighth Circuit Is Not In Conflict With Decisions Of Other Circuit Courts Of Appeal Or With This Court.

This is a disparate treatment case. The decision below is not in conflict with decisions of other circuits or with this Court. Petitioners ignore the findings of the Eighth Circuit that substantial evidence exists from which a trier of fact could infer that Petitioners' articulated reason for their employment decision was pretextual.

The decision below is firmly grounded in the decisions of this Court, particularly *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), *United States Postal Serv. v. Aikens*, 460 U.S. 711 (1983) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The Eighth Circuit's analysis of the application of the *McDonnell Douglas* formula, as is applied to the facts of this case, is succinct and unambiguous:

> A defendant who articulates a legitimate, nondiscriminatory reason overcomes the presumption of discrimination raised by the *prima facie* case, *United States Postal Serv. v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Burdine*, 450 U.S. at 255), and the case must proceed to the third stage of analysis. At the third stage, the plaintiff must demonstrate that the defendant's proffered reason is mere pretext, "either directly, by persuading the court that a discriminatory

reason more likely (than not) motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. This burden "merges with the (plaintiff's) ultimate burden of persuading the court that she (or he) has been the victim of intentional discrimination." *Id.* (A.7-8)

* * *

As the *Burdine* Court recognized, "(the plaintiff's initial evidence) and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." 450 U.S. at 255 n. 10. Evidence of Plaintiff's rank, her higher examination and performance ratings, and her years of experience, when compared with Otey's supervisory experience and job recommendations, could reasonably lead a trier of fact to infer that Defendants' proffered reasons were pretextual.

Plaintiff does not merely assert that she has been discriminated against and that Defendants are not telling the truth. She provides evidence to challenge Defendants' articulated reason for their promotional decision. To grant summary judgment would be inappropriate on this record, especially because this disparate treatment case is based largely on circumstantial evidence and the relative merit of each party's case depends significantly on credibility. Consequently, we hold that there is a genuine dispute of material fact concerning the ultimate issue of discrimination. (A.9)

Petitioners have not shown that the decision of the Eighth Circuit is in conflict with the decisions of this Court or of the

other circuits. Petitioners depart from their previous position taken in the District Court. Instead of focusing on step three of the *McDonnell Douglas* analysis, they shift to step one and state that a *prima facie* case has not been shown. In particular, they state that the fourth element of the *prima facie* case has not been demonstrated. This will be discussed in part B. below.

B. The Decision of The Eighth Circuit Does Not Hold That The Fourth Element Of A *Prima Facie* Case In A Promotion Case Can Be Established By Showing Only The Minimal Qualifications For The Job.

Petitioners contend that the Eighth Circuit has rendered a decision which holds that the *prima facie* case can be demonstrated by only showing that the plaintiff is minimally qualified for the job. There is nothing in the decision to support this contention.

Petitioners have raised new issues in this Court which had been conceded by them in District Court. These issues were not properly appealed in the Court of Appeals. The District Court made a specific finding that the "defendants concede, and the facts support, that there is sufficient evidence to support a *prima facie* case of age or sex discrimination in defendant's failure to promote plaintiff." (A.17) Petitioners' focus at the District Court was on the third step of the *McDonnell Douglas* analysis wherein they contended that the Respondent had shown no evidence of pretext. Now Petitioners contend that the evidence of Respondent's qualifications was insufficient to establish a *prima facie* case. The record in this case however, demonstrates that Respondent's qualifications were *superior* to those of the candidate chosen. The fact that Respondent scored higher on the exam, was ranked higher on the register, had superior performance appraisals, had supervisory training, more years of experience and more varied experience in the job functions undertaken in the seven person local office over which she would be in charge, all demonstrate Respondent's superior qualifications.

These facts render Petitioners' arguments about "relatively similar" qualifications specious and moot.

Petitioners also contend that Respondent's evidence of minimal qualifications for the job do not address the legitimate reason for the employment decision. There is no decision of this Court or any Court of Appeals which holds that the elements of the *prima facie* case — step one — must address or defeat the "legitimate reason" articulated by the employer for the employment decision. This would require some degree of clairvoyance on the part of the employee. Petitioners confuse an employee's duty to produce evidence of pretext with their threshold duty to demonstrate a *prima facie* case. If Petitioners' contention was to become law, an employer would be able to pick out some job qualification which the candidate does not possess and hold it up as justification for not hiring that candidate. A rule such as this would guarantee the employer's success in foisting a pretextual reason on the EEOC and the courts.

In the record below the Petitioners made no showing that "supervisory experience" or the prior holding of a "supervisory position" was a pre-requisite for the Manager I job. The articulation of this sole reason as justifying the promotion of Mr. Otey, could alone lead a trier of fact to conclude that the reason given was pretextual. Petitioners would have it that any reason articulated by an employer is conclusively "legitimate" or conclusively "nondiscriminatory". That is a contention diametrically opposed to the decisions of this Court in *Burdine, supra*, and *McDonnell Douglas, supra*.

Finally, Petitioners present (at page 21 of their Petition) a hypothetical case involving a hiring situation in the context of a college setting. This hypothetical case is in no way analogous to the case at bar. In the hypothetical case, the candidate chosen had qualifications superior to the complaining candidate. The record in this case demonstrates that Respondent out-performed Mr. Otey in every objective measurement of employee performance,

experience and ability which the state merit system of examination, grading and ranking provided. The Petitioners ignored all of the objective criteria provided them by the state merit system and articulate one lone reason for their selection of Mr. Otey. Petitioners seek to ask this Court to hear this case on hypothetical facts which bear no relation to the facts adduced in this record.

This Court held in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) that the shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the "plaintiff (has) his day in court despite the unavailability of direct evidence." Considering this record, the "full and fair opportunity" (*McDonnell Douglas, supra,* at 804-805 n. 18) to demonstrate that the employer's stated reason for the employee's rejection is pretextual, can only be accomplished in a trial.

CONCLUSION

The law pertaining to the issues raised in this case is well settled and needs no clarification. Summary judgment is not appropriate in this case because the Respondent has adduced facts which would allow a trier of fact to infer that the Petitioners' articulated reason for the employment decision to promote Mr. Otey over the candidacy of the Respondent is pretextual. There is a genuine dispute of material fact concerning the ultimate issue of discrimination. This case does not merit the Court's review. The Petition should be denied.

Respectfully submitted,

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